UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUMANA NAGARWALA, D-1,

and

FAKHRUDDIN ATTAR, D-2,

Defendants.
_______________________________________/

No. 17-cr-20274

Honorable Bernard A. Friedman

MOTION TO DISMISS COUNT SIX

Defendant Jumana Nagarwala, M.D., through her attorney Shannon Smith, and Fakhruddin Attar, M.D., through his attorney Mary Chartier, respectfully request that this Court dismiss count 6 of the indictment, pursuant to Federal Rule of Criminal Procedure 12(b), because the conduct of Dr. Nagarwala and Dr. Attar does not fall within the proscriptions of the statute.

Respectfully submitted,

Dated: 9/20/2017

/s/ Shannon M. Smith
SHANNON M. SMITH
Attorney for Jumana Nagarwala

Dated: 9/20/2017

/s/ Mary Chartier
MARY CHARTIER
Attorney for Fakhruddin Attar

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BRIEF IN SUPPORT OF MOTION TO DISMISS COUNT SIX

Count 6 of the indictment charges Jumana Nagarwala, M.D., and Fakhruddin Attar, M.D., with conspiracy to transport a minor with the intent to engage in criminal sexual activity in violation of 18 U.S.C. § 2423(a) and (e). This count should be dismissed because the conduct of Dr. Nagarwala and Dr. Attar, even if believing the government's version of events, does not fall within the proscriptions of the statute. Moreover, if the government's interpretation of Section 2423(a) prevails, count 6 of the indictment should be dismissed based on the rule of lenity, which requires courts to limit the reach of criminal statutes to the clear import of their text and to construe any ambiguity against the government. Finally, under the government's expanded interpretation, the statute failed to provide fair warning to Dr. Nagarwala and Dr. Attar that their conduct violated the statute, in violation of the Due Process Clause of the Fifth Amendment.

BACKGROUND

In count 6 of the indictment, Dr. Nagarwala and Dr. Attar stand accused of conspiracy to transport a minor with the intent to engage in criminal sexual activity, contrary to 18 U.S.C. § 2423(a), (e). (First Superseding Indictment, Doc. 58, Page ID # 515-16.) Section 2423(a) specifically uses the phrase "sexual activity" to proscribe conduct. The government seeks to import the definition of "sexual act" in Section 2246 into Section 2423(a). In part, Section 2246 defines "sexual act" to mean "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]" 18 U.S.C. § 2246(2)(D).

As alleged by the government at Dr. Nagarwala's April 17, 2017 detention hearing, Dr. Nagarwala "is a member of a religious and cultural community in the metropolitan Detroit area. It is a community that is also worldwide and it's a community that has historically practiced female genital mutilation on girls at approximately age seven." (Transcript, Doc. 10, Page ID # 51-52.) The government claims that "members of [this] particular religious and cultural community . . . practice FGM on young girls in the Community as part of their religious and cultural practice." (Swanson April 12, 2017 Aff., ¶ 8.) The government has never claimed that the alleged "FGM procedures" were performed for the purpose of obtaining sexual gratification.

Instead, the government has repeatedly articulated its baseless claim that 18 U.S.C. § 2246(2)'s definition of "sexual act" is synonymous with Section 2423(a)'s use of the phrase "sexual activity." As a result, the government contends that the phrase "sexual activity," as used in Section 2423(a), does not require a showing that the alleged activities engaged in were motivated by libidinal gratification. In part, Section 2246 defines "sexual act" to mean "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]" 18 U.S.C. §

2246(2)(D). Essentially, the government theorizes that because "[o]ne purpose of FGM is to curb the sexuality of girls and women by making sex painful[,]" in performing the alleged FGM procedures, Dr. Nagarwala and Dr. Attar "acted with the intent to abuse, humiliate, harass, and/or degrade minor children." (Swanson April 12, 2017 Aff., ¶ 6, n. 1.) According to the government, such a showing is sufficient to establish that a defendant transported a minor with the intent to engage in sexual activity with the minor for purposes of Section 2423(a). *Id.* The government's position fails as matter of law.

APPLICABLE LAW

This Court has the authority to dismiss count 6 of the indictment pursuant to Rule 12 of the Federal Rules of Criminal Procedure. "Moreover, district courts may make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate finder of fact." *United States v. Levin*, 973 F.2d 463, 467 (6th Cir. 1992). As the United States Court of Appeals for the Sixth Circuit has held, "It should be noted that the district court was not limited to the face of the indictment in ruling on the motion to dismiss since Rule

12 vested the court with authority to determine issues of fact in such a manner as the court deems appropriate." *Levin*, 973 F.3d at 467 (interior quotation marks and citations omitted). The issue in the instant case is a question of law that is capable of determination before trial. *Id.* at 470; see also *United States v. Jones*, 542 F.2d 661, 664-665 (6th Cir. 1976).

ANALYSIS

I. The government's desire to import the definition of another phrase into the statute at issue ignores the fundamental rules of statutory interpretation and statutory construction.

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005). "In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'" *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985), quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 195 (1985). If the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced. *United States v. Ron Pair Entrs., Inc.*, 489 U.S. 235, 241 (1989).

A. The plain meaning of "sexual activity" as used in 18 U.S.C. § 2423(a) encompasses activity that is of or relating to behavior associated with libidinal gratification and the plain meaning of the text must be enforced.

To sustain a conviction pursuant to 18 U.S.C. § 2423(a), the government is required to prove beyond a reasonable doubt that the defendant: (1) knowingly transported a minor across state lines and (2) did so with the intent to engage in sexual activity with the minor for which any person could be charged with a crime. 18 U.S.C. § 2423(a). The specific language of the statute states as follows:

> (a) **Transportation with intent to engage in criminal sexual activity.**-A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life. [*Id.*]

The statute further provides the following with respect to attempts and conspiracies: "Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection." *Id.* at (e).

The key term at issue in this case is "sexual activity." The statute, which is found in Chapter 117 of Title 18 of the United States Code, does not define "sexual activity." In fact, "sexual activity" is not defined throughout the entirety of Title 18 of the United States Code.

By contrast, where similar statutory terms are used, Congress took care to define them explicitly for purposes of the sections or chapters in which they are found. For example, the terms "sexual act" and "sexual contact" are defined in 18 U.S.C. § 2246(2) for sexual abuse offenses that occur in a federal prison. Likewise, the term "sexually explicit conduct" is defined in 18 U.S.C. § 2256(2) for offenses that involve the sexual exploitation of children.

In the statute at issue, Congress defined the term "illicit sexual conduct" in 18 U.S.C. § 2423(f). The statute also defined the terms "sexual act," "commercial sex act," and "child pornography" in 18 U.S.C. § 2423(f) by referencing other statutory definitions. Notably, Congress did not define the term "sexual activity."

Because the term "sexual activity" is not defined, this Court may use a dictionary definition to determine the term's meaning. "[A] court may consult a dictionary definition for guidance in discerning the plain meaning of a statute's language." *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1060 (6th Cir. 2014). In *United States v. Mateen*, 806 F.3d 857, 861 (6th Cir. 2015), the United States Court of Appeals for the Sixth Circuit had occasion to determine the plain meaning of the word "sexual" and, relying on *Webster's Third New International Dictionary* 2082 (1981), determined "'[s]exual' is commonly understood to mean 'of or relating to the sphere of behavior associated with libidinal gratification.'"

Other circuits have also defined "sexual" according to its ordinary, plain meaning, encompassing libidinal gratification. In *United States v. Fugit*, 703 F.3d 248, 254 (4th Cir. 2012), the court determined that in the context of 18 U.S.C. § 2422(b), "sexual" as used in the phrase "sexual activity" means of or relating to the sphere of behavior associated with libidinal gratification. In *Ramos-Garcia v. Holder*, 483 Fed. Appx. 926, 930 (5th Cir. 2012), quoting *American Heritage Dictionary*, 1124 (2d College ed. 1982), the court held that in the context of charging one as subject to removal from the United States in connection with a guilty plea to indecent behavior with juveniles, the court determined that "[a]n act is sexual if it is '[o]f, pertaining to, affecting, or characteristic of sex, the sexes, or the sex organs and their functions,' and includes an act whose purpose is 'sexual arousal or gratification.'" In *United States v. Garcia-Juarez*, 421 F.3d 655, 659 (8th Cir. 2005), the court determined that in the context of the sentencing guidelines, the word "sexual" in the phrase "sexual abuse of a minor" indicated that the perpetrator's intent in committing the abuse must be to seek libidinal gratification. In *United States v. De La Cruz-Garcia*, 590 F.3d 1157, 1160 (10th Cir. 2010), quoting *Webster's 3d Int'l Dictionary Unabridged*, 2081, the court held that "'[s]exual' means 'of or relating to the sphere of behavior associated with libidinal gratification.'" And in *United States v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001), the court determined that in the context of sentencing guidelines, the term "sexual" in the phrase "sexual abuse of a minor" indicates that the perpetrator's intent in committing the abuse is to seek libidinal gratification.

In this case, the phrase "sexual activity" is a critical component of the law necessary to determine whether Dr. Nagarwala and Dr. Attar can even be charged with violating Section 2423(a). Given that the United States Court of Appeals for the Sixth Circuit has established the plain meaning of "sexual," the use of the word in 18 U.S.C. § 2423(a) is unambiguous and the plain meaning of the text must be enforced. Here, the law is clear that the "sexual activity" proscribed in 18 U.S.C. § 2423(a) must encompass activity that is of or relating to behavior associated with libidinal gratification. Where the statute's language is plain, as is the case here, "'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Nevertheless, at times, even when the statutory language appears plain, legislative history must be examined to ascertain congressional intent. *See United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1183 (6th Cir. 1982). Even if this court examines the legislative history in this case, the interpretation that "sexual activity" is of or related to behavior associated with libidinal gratification is consistent with the congressional intent in enacting 18 U.S.C. § 2423(a), as evidenced by the legislative history of the statute.

B. The plain meaning of "sexual activity," which encompasses activity relating to behavior associated with libidinal gratification, is consistent with the congressional intent of 18 U.S.C. § 2423(a).

The statutory antecedents of 18 U.S.C. § 2423(a) date back to the early part of the twentieth century. In 1910, Congress enacted the Mann Act to combat the so-called "white slave trade" in which young women were forced into prostitution or sold outright. *United States v. Vang*, 128 F.3d 1065, 1069 (7th Cir. 1997). Originally, the Mann Act prohibited, among other things, the interstate transportation of any woman or girl for purposes of prostitution, "debauchery", or "any other immoral purpose." Act of June 25, 1910, § 2, 36 Stat. 825 (1910) (amended 1986). In enacting the Mann Act, "Congress was attempting primarily to eliminate the 'white slave' business which use[d] interstate and foreign commerce as a means of procuring and distributing its victims and 'to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.'" *Mortensen v. United States*, 322 U.S. 369, 377 (1944) (citing H. Rep. No. 47, p. 10 (61st Cong., 2d Sess)).

Problematically, however, "enforcement of the Mann Act yielded strange outcomes that were shaped by [law enforcement's] understanding of the 'any other immoral purpose' clause at any given moment." *Policing Sexuality: The Mann Act and the Making of the FBI*, Jessica R. Pliley, 9 (Harvard University Press, 2014). For example, in 1913, the federal government used the "any other immoral purpose clause" to prosecute a case of noncommercial sexual activity where two married men brought their mistresses across state lines for a vacation, where they engaged in consensual sexual activity. *Caminetti v. United States*, 242 U.S. 470, 482-483, 485 (1917). Both men were found guilty of violating the Mann Act. *Id.* at 483. In 1917, the United States Supreme Court was presented with the question of whether Congress intended the Mann Act to reach only commercialized vice and the traffic of women, or whether Congress also intended to criminalize other conduct that was thought to be reprehensible in morals, like transporting a mistress across state lines. *Id.* at 484-485. The Court, in relying on its obligation to enforce the plain meaning of the language in the statute, held that transportation of a woman with the intent that she be a mistress or concubine fell within the "any other immoral purpose" clause of the Mann Act and affirmed the conviction. *Id.* at 486.

For sixty years, the holding in *Caminetti* persisted; however, in 1977, Congress, in an effort to combat child pornography, revisited the Mann Act. On September 16, 1977 the Committee on the Judiciary released Senate Report No. 95-438, in which the Committee addressed the inadequacies of existing federal law in dealing with the use of minors in connection with prostitution and pornography. S. Rep. 95-438, 1978 U.S.C.C.A.N. 40, 41. Notably, within the same report, it was recommended, at the suggestion of the Justice Department, that an amendment to the Mann Act be made to clarify the archaic language used in Section 2423. S. Rep. 95-438, 14, 1978 U.S.C.C.A.N. 40, 51. On February 6, 1978, Public Law 95-225 was adopted and Section 2423(a) was officially amended to proscribe transportation of another with the intent that such person engage in prostitution or engage in commercially exploited prohibited sexual conduct. PL 95-225 (S 1585), PL 95-225, February 6, 1917, 92 Stat. 7. "Prohibited sexual conduct" was defined as meaning sexual intercourse, bestiality, masturbation, sado-masochistic abuse (for the purpose of sexual stimulation), or lewd exhibition of the genitals or pubic area of any person." *Id.* As noted in House Report 95-696, the Committee on the Judiciary "removed language in 18 U.S.C. 2423 concerning 'debauchery' and 'other immoral acts,' because the case law [had shown] no clarity in the definitions of these items." H. Rep. No. 95-696, 95th Cong., 1st Sess (Oct. 12, 1977) at 11.

Eleven years later, Congress again had the opportunity to reevaluate the Mann Act when the "Child Sexual Abuse and Pornography Act of 1986" was introduced, in part, by Senator William V. Roth, Jr. Again, this act was meant to address the inadequacies of existing federal law in dealing with the use of minors in connection with prostitution and pornography. One of the inadequacies to be addressed by the act encompassed the commercial exploitation requirement of the 1977 amendment to Section 2423. H.R. Rep. 99-910, 1986 U.S.C.C.A.N. 5952, 5953. In an effort to demonstrate the need for the amendment, Senator Roth explained:

> Our investigation revealed that children of both sexes are victimized by pedophiles, who sometimes trade their young victims by transporting them back and forth across state lines. [The Child Abuse and Pornography Act] will . . . apply whether or not the defendants seek or obtain financial advantage. [132 Cong. Rec. S14225-01.]

Similarly, on September 27, 1986, the Committee on the Judiciary released House Report No. 99-910, which noted:

> Currently the offense of transporting a minor across state lines for the purpose of having the minor participate in prohibited sexual conduct (18 U.S.C. 2423, Chapter 117 of title 18) is prosecutable only if the prohibited sexual conduct will be commercially exploited. This is not a problem in regard to the conduct for which section 2423 was originally intended – prostitution – since commercial purpose is an element of prostitution. However, in the case of transportation for the purpose of participating in the production of child pornography materials, private (rather than commercial) exploitation is frequently the objective, and thus section 2423 cannot now be successfully invoked. H.R. Rep. 99-910, 6-7, 1986 U.S.C.C.A.N. 5952, 5956-57.

On November 7, 1986, the Child Abuse and Pornography Act of 1986 became law, and 18 U.S.C. § 2423(a) was amended to its current form, so that statute could effectively combat, in the words of Senator Roth, "pedophiles, who sometimes trade their young victims by transporting them back and forth across State lines." 132 Cong. Rec. S14225-01; see also PL 99-628 (HR 5560), PL 99-628, November 7, 1986, 100 Stat. 3510.

Undoubtedly, the plain meaning the United States Court of Appeals for the Sixth Circuit attached to the term "sexual" in *Mateen*, 805 F.3d at 861, encompassing activities of or relating to behavior associated with libidinal gratification, is consistent with the legislative history and congressional intent of 18 U.S.C. § 2423(a), given that the statute has always focused on proscribing certain conduct engaged in for the purpose of attaining sexual gratification. Thus, the law is clear that under Section 2423(a), where a defendant does not act with the intent to engage in conduct in pursuit of libidinal gratification, the defendant lacks the intent necessary for a criminal conviction and the conduct does not fall within the proscriptions of Section 2423(a).

C. **The government's remarks and sworn statements concerning the definition of "sexual activity" as used in 18 U.S.C. § 2423(a) demonstrate the government is using the definition of "sexual act" as defined by 18 U.S.C. § 2246(2).**

Although count 6 of the indictment consists only of a bare recitation of statutory language concerning Section 2423(a) and does not articulate what "sexual activity" was allegedly engaged in to constitute a violation, the government has repeatedly indicated that it is proceeding upon its belief that female genital mutilation, 18 U.S.C. § 116, fits within the definition of "sexual activity" as used in Section 2423(a). The government's position is undeniably premised upon its assertion that the phrase "sexual activity" in Section 2423(a) is synonymous with the phrase "sexual act," as defined in 18 U.S.C. § 2246(2).

The government articulated its position at the May 3, 2017 detention hearing as follows:

> Section 2423 makes it a crime to knowingly transport a minor in interstate or foreign commerce with the intent that the child engage in any sexual activity for which a person can be charged with a criminal offense. "Sexual act" is defined at 18 U.S.C. 2246 as the touching or penetration of the genitalia of a person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse, or gratify the sexual desire of any person. So the statutory language is broader than simply to arouse sexually. And because it includes an intent to abuse, humiliate, harass, or degrade, the FGM statute fits within the definition of any sexual activity for which any person can be charged with a criminal offense. [Transcript of May 3, 2017 Detention Hearing, Doc. 33, Page ID # 183-184.]

Special Agent Kevin J. Swanson also evidenced the government's position in his affidavit supporting the original criminal complaint concerning Dr. Nagarwala, which states:

> Federal law defines "sexual act" as touching of the genitalia with the intent to abuse, humiliate, harass, or degrade. 18 U.S.C. § 2246. NAGARWALA's removal of clitoral skin from seven-year-old minor females is a sexual activity that violates both federal and state law.

* * *

> One purpose of FGM is to curb the sexuality of girls and women by making sex painful. As a result, there is probable cause to believe that the intent is to abuse, humiliate, harass, or degrade. Therefore, FGM qualifies as a "sexual act" for which any person can be charged with a criminal offense. [Swanson April 12, 2017 Aff. at ¶ 6, n. 1.]

The government's position, however, is misguided. Notwithstanding the fact that Section 2423(a) includes the phrase "sexual activity" and Section 2246(2) defines "sexual act," the express statutory language of Section 2246 makes it clear that its definitions are to be used only in connection with Chapter 109A of Title 18 of the United Stated Code. Instructively, 18 U.S.C. § 2246 is entitled "Definitions for chapter" – meaning chapter 109A – and all terms defined in Section 2246 are preceded by the language, "As used in this chapter[.]"18 U.S.C. § 2246. Notably, Section 2246 is codified in Chapter 109A, whereas Section 2423, the offense at issue in this case, is found within Chapter 117. Consequently, the government's use of the definition within Section 2246 does not apply to Chapter 117 of Title 18 of the United States Code and, therefore, does not apply to 18 U.S.C. § 2423(a).

When counsel for Dr. Attar mentioned this discrepancy at the motion hearing held before this Court on June 7, 2017, the government stated that it believed that there is a "circuit split" as to whether Section 2246's definition applies to the matter before this Court and also argued that the matter is one of first impression in the Sixth Circuit. Assumedly, the government is referring to a series of cases concerning whether a defendant must engage in interpersonal physical contact with a minor to satisfy the "sexual activity" element of 18 U.S.C. § 2422(b), which states:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

This statute is typically invoked when an adult attempts to persuade a minor to engage in unlawful sexual activity, usually via internet conversations. In *United States v. Taylor*, 640 F.3d 255, 256 (7th Cir. 2011) and *United States v. Fugit*, 703 F.3d 248, 250 (4th Cir. 2012), the defendants were convicted or pled guilty to violating 18 U.S.C. § 2422(b). In both cases, the defendants entered online chat rooms and engaged in sexually explicit conversations with persons who had identified themselves as minors. *Taylor*, 640 F.3d at 257; *Fugit*, 703 F.3d at 251.

In *Taylor*, 640 F.3d at 256, the government relied on two Indiana offenses to convict the defendant. One of the Indiana statutes used language about "touch[ing] or fond[ling] the person's own body . . . in the presence of a child less than fourteen (14) years of age with the intent to arouse or satisfy the sexual desires of the child or the older person," Ind. Code § 35-42-4-5(c)(3), and the other referenced "knowingly or intentionally solicit[ing] a child under fourteen (14) years of age [or believed to be so] . . . to engage in . . . any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person," Ind. Code § 35-42-4-6(b)(3). *Taylor*, 640 F.3d at 256. In *Fugit*, where the defendant asked an eleven-year-old girl to masturbate and take her shirt off, the government relied on Section 18.2-370 of the Code of Virginia 1950, which proscribes taking indecent liberties with children, to provide the factual basis for the defendant's guilty plea to violating Section 2422(b). *Fugit*, 703 F.3d at 251.

In both cases, the Seventh and Fourth Circuits were tasked with determining whether actual or attempted physical contact was required by Section 2422(b)'s "sexual activity" element. In *Taylor*, 640 F.3d at 259-260, the Seventh Circuit applied 18 U.S.C. § 2246's definition of "sexual act," which does require physical contact, to Section 2422(b) and reversed the defendant's conviction. The Fourth Circuit, on the other hand, unambiguously rejected the Seventh Circuit's holding in *Taylor*, and determined that to "cut and paste" Section 2246's definition of "sexual act" into the place of Section 2422(b)'s "sexual activity" requirement would contravene express statutory text because Section 2246 explicitly limits the definitions provided therein to the chapter in which it resides. *Fugit*, 703 F.3d at 256. Instead, the Fourth Circuit applied the plain and unambiguous meaning of the phrase "sexual activity" to the statute. The court stated:

> In determining the meaning of "sexual," we find instructive a definition from Webster's: "of or relating to the sphere of behavior associated with libidinal gratification." *Webster's New International Dictionary* 2082 (3d ed. 1993). . . . Likewise, we find the most pertinent definition of "activity" to be "an occupation, pursuit, or recreation in which a person is active." *Webster's, supra,* at 22. [*Id.* at 254-255.]

As a result, the Fourth Circuit held that Section 2422(b) did not require a showing of interpersonal physical contact and affirmed the defendant's conviction. *Id.* at 254, 261.

Notably, the courts in both *Taylor* and *Fugit* considered facts where the conduct underlying the convictions was undeniably engaged in for the purpose of obtaining sexual gratification. Unlike the standard of "sexual activity" asserted by the government here, *neither court held that the term "sexual activity," as used in Section 2423(a), is meant to encompass non-sexual conduct.* Nevertheless, in an effort to conform Section 2423(a) to Dr. Nagarwala and Dr. Attar's alleged conduct, the government seeks to supplant the plain meaning of "sexual activity" with Section 2246(2)'s definition of "sexual act". The government's zeal in trying to use such an interpretation, however, would lend itself to nonsensical results.

Consider, for example, the case of James Raymond, who was convicted of violating Section 2423(a) after a bench trial in Maine. *United States v. Raymond*, 710 F. Supp. 2d 161, 167 (D. Me. 2010), *aff'd* 697 F.3d 32 (1st Cir. 2012). Mr. Raymond, a public school teacher, took an eleven-year-old girl, who was also a former student, and her nine-year-old sister from their home in Maine to a waterpark in New Hampshire. *Id.* at 162. While in line for a ride, Mr. Raymond touched the eleven-year-old's buttocks intentionally three times and touched the girl's buttocks on the ride home from the park, while the girl pretended to sleep. *Id.* at 162-163. The court noted that during a videotaped interview, Mr. Raymond admitted "to his physical urge to touch young girls' buttocks and to masturbating 'once or twice a week' about 'kids' (he said 'nine times out of ten it's not a kid from school' and that 'a little grope up someone's skirt isn't something that I see worth masturbating to[.]'" *Id.* at 163. Testimony also demonstrated that on a prior occasion, while on a bus, Mr. Raymond had put his hand inside the same eleven year-old-girl's shirt and that after the girl slapped his hand away, Mr. Raymond returned his hand to the back of her leg. *Id.* In finding Mr. Raymond guilty of violating Section 2423(a), the court concluded "Raymond purposefully touched the eleven-year-old's buttocks on both trips and that he did so for sexual gratification, not by accident." *Id.* at 164.

Remarkably, under the interpretation of Section 2423(a) advanced by the government in the matter before the court, Mr. Raymond could not have been found guilty of violating the statute, given that the government would not have been able to demonstrate that Mr. Raymond's acts constituted "sexual activity," even though it is clear Mr.

Raymond groped the minor for the purpose of sexual gratification. Section 2246(2)'s definition of "sexual act" does not encompass over-the-clothes touching and also does not include under-the-clothes touching, with the exception of under-the-clothes touching of the genitalia. 18 U.S.C. § 2246(b)(D). Mr. Raymond's touching of the girl, therefore, would have been excluded if the government's position that the Section 2246(b) definition was applicable to a Section 2423 prosecution, and the prosecution would have failed.

Consider also the case of Scott Hayward, who was convicted of violating Section 2423(a) by a jury in the Western District of Pennsylvania. *United States v. Hayward*, 359 F.3d 631, 632-633 (3rd Cir. 2004). Mr. Hayward, as owner of a competitive cheerleading school, took three minors, identified in deference to their ages as V-14, V-15, and V-18, to a national cheerleading competition in London, England. *Id.* After a night out at a club in London, the group returned to their hotel where Mr. Hayward pulled down the shirt of V-15 and fondled her breasts, forced V-14 to kiss him, pushed V-14's head toward his covered penis, and, later, placed V-14's and V-18's hands on his bare penis. *Id.*

at 633-634. A jury convicted Mr. Hayward of violating 18 U.S.C. § 2423(a) with respect to V-14 and V-15. *Id.* at 635.

Again, under the government's claim that the phrase "sexual activity" in Section 2423(a) is synonymous with the phrase "sexual act," as defined in Section 2246(2), Mr. Hayward would not have been guilty of violating Section 2423(a) because he did not penetrate the minors, and he did not touch the minors' genitalia under their clothing. Oddly, as per the position asserted by the government in the matter before this Court, the kissing, fondling, and masturbating of Mr. Hayward would not have constituted "sexual activity."

Here, the government does not, and cannot, contend that Dr. Nagarwala and Dr. Attar's conduct was for the purpose of obtaining sexual gratification. Undeterred, however, the government, perhaps without considering the ramifications of their attempt to use another statutory provision's definition, has repeatedly made statements advancing its position that the phrase "sexual activity" as used in Section 2423(a) is synonymous with Section 2246's definition of "sexual act." However, the government's interpretation of Section 2423(a), which is the statute at issue in this case, fails to provide fair warning to the Dr. Nagarwala and Dr. Attar, in violation of the Due Process Clause. Moreover, the government's position, as will be explained below, renders the statute subject to arbitrary enforcement.

II. The rule of lenity mandates that this Court dismiss count 6 of the indictment because if there are two equally plausible interpretations of a criminal statute, the defendant is entitled to the benefit of the more lenient one.

If this Court determines that the government's proposed interpretation of Section 2423(a) is plausible given the statutory language and legislative history, then count 6 of the indictment must still be dismissed pursuant to the rule of lenity. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. *United States v. Santos*, 553 U.S. 507, 513 (2008); *United States v. Bass*, 404 U.S. 336, 348 (1971). Here, the government's position necessarily leaves Section 2423(a) ambiguous, given that the government's interpretation ignores the plain meaning of the language at issue.

When courts evaluate whether a statue is ambiguous under the rule of lenity, it is not enough for the language to be unclear. *United States v. Lechner*, 806 F.3d 869, 874 (6th Cir. 2015). Instead, the rule of lenity is applied "'only when the plain language, structure, and legislative history provide no guidance.'" *Id.*, quoting *United States v. King*, 516 F.3d 425, 432 (6th Cir. 2008). Thus, if a criminal statute "remains ambiguous after consideration of its plain meaning, structure, and legislative history, the rule of lenity is applied in favor of criminal defendants." *United States v. Boucha*, 236 F.3d 768, 774 (6th Cir. 2001).

In *Bass*, 404 U.S. at 348, the United States Supreme Court enunciated the policies behind the honored axiom of lenity:

> [The rule of lenity] is founded on two policies that have long been part of our tradition. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should. [Internal citations and quotation marks omitted.]

"Accordingly, the 'policy of lenity means that the Court will not interpret a federal statute so as to increase the penalty it places on an individual when such an interpretation can be no more than a guess as to what Congress intended.'" *Boucha*, 236 F. 3d at 774-775, quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

If this Court determines that the government's interpretation of Section 2423(a) is valid, the statute, nonetheless, must be construed as ambiguous, given that two interpretations – one being the plain meaning of the text and the other being the position purported by the government – would equally apply to the statute. In such a circumstance, "the Court applies a policy of lenity and adopts the less harsh meaning." *Lander v. United States*, 358 U.S. 169, 177 (1958).

Notably, even in *Taylor*, 640 F.3d at 259-60, discussed earlier, the United States Court of Appeals for the Seventh Circuit, in so holding, noted:

> Maybe our interpretation of [the phrase "sexual activity" in] section 2422(b) is no more plausible than the government's. But when there are two equally plausible interpretations of a criminal statute, the defendant is entitled to the benefit of the more lenient one. The tie must go to the defendant. This venerable rule (the 'rule of lenity,' as it is called) not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead. [Internal citations and quotation marks omitted.]

The same is true in the matter before this Court, and so as to avoid guessing as to what Congress intended when it used the phrase "sexual activity" in Section 2423(a), the "tie" must go to the defendants, and count 6 must be dismissed.

III. Count 6 of the indictment must also be dismissed because 18 U.S.C. § 2423(a) is unconstitutionally vague as applied to Dr. Nagarwala and Dr. Attar.

The Due Process Clause forbids punishing a criminal defendant for conduct that he or she could not reasonably understand to be proscribed. As the United States Supreme Court has stated, due process requires that a penal statute define a criminal offense "'(1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling v. United States*, 561 U.S. 358, 402-403 (2010), quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In essence, a criminal law must provide the public with fair notice as to what is prohibited and limit the potential for arbitrary enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). A law is impermissibly vague if it fails to do either. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The critical question is whether the statute made it reasonably clear at the relevant time that the defendant's conduct was criminal. *United States v. Lanier*, 520 U.S. 259, 267 (1997).

A. The Due Process Clause requires the dismissal of count 6 of the Indictment because Section 2423(a), as interpreted by the Government, is unconstitutionally vague.

Count 6 of the indictment charges that Dr. Nagarwala and Dr. Attar violated 18 U.S.C. § 2423(a), which provides:

> A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

In an effort to morph the plain meaning of Section 2423(a) into a statute that can be manipulated to punish Dr. Nagarwala and Dr. Attar, the government contends that in order to sustain a conviction under Section 2423(a), it need not demonstrate that the "sexual activity" the defendant intended to engage in be motivated by the pursuit of libidinal gratification. Rather, the government contents that 18 U.S.C. § 2246(2)'s definition of "sexual act" is synonymous with Section 2423(a)'s use of the phrase "sexual activity," and as such, Section 2423(a)'s use of the phrase "sexual activity" does not require a showing that alleged activities engaged in were motivated by sexual gratification. This groundless attempt by the government to *conform* Section 2423(a) to the alleged conduct of Dr. Nagarwala and Dr. Attar must fail as a matter of law because it does not comport with the language in the statute and the meaning of that language.

(i) If Section 2423(a) can be violated by a showing of non-sexual conduct, then the statute fails to provide fair notice of the conduct it proscribes.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *City of Chicago*, 527 U.S. at 58 (citation and internal quotation marks omitted). For that reason, criminal law must draw a line between what conduct is prohibited and what is not. *Id.* at 57. This allows citizens to conform their behavior to the law. *Id.* at 58.

Here, if the government's position were adopted, the stage would be set for Section 2423(a) to be used to punish a myriad of non-sexual conduct, while also intimating tacit approval of illicit, sexual, predatory conduct. Certainly, this would contravene the plain meaning of the statute and Congress' intent in enacting Section 2423(a). Ironically, pursuant to the standard set forth by the government, one is guilty of violating Section 2423(a) if he or she engages in so-called "FGM procedures" pursuant to religious or cultural practices for a non-sexual purposes, but one would *not* be guilty of violating Section 2423(a) if he or she kissed and fondled the breasts of a minor, masturbated in front of a minor, used the hands of minor to masturbate, and more. As a result, far from providing a model of clarity and proper notice, the government's reading of Section 2423(a) would only encourage the vagueness and indeterminateness that due process mandates must be avoided.

If the government were correct that it need not prove that a defendant engaged in certain activities in pursuit of libidinal gratification, Section 2423(a) would lose its constitutional mooring. Its application would be so outlandish and extreme that the only appropriate response by a court asked to enforce such a provision would be to declare it void for lack of notice of the conduct that is prohibited and unconstitutionally vague.

(ii) Without the requirement that the government demonstrate that a defendant engaged in conduct for the purpose of obtaining libidinal gratification,

Section 2423(a) is subject to arbitrary and discriminatory enforcement.

The government's proposed interpretation of Section 2423(a) not only fails to require the notice required by the Constitution, but the government's unconstitutionally vague interpretation would open the door to arbitrary enforcement. As the United States Supreme Court has stated, the "other principal element of the [vagueness] doctrine" is the "requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983). Without such limitation, the risk exists that a criminal statute would "permit a standardless sweep[.]" *Id.* at 358. This lack of standards would allow prosecutors, judges, and juries to resolve the section's scope "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

Here, the government's position concerning Dr. Nagarwala and Dr. Attar – that the government need not demonstrate that the defendants acted for the purpose of achieving libidinal gratification – is diametrically opposed to the plain meaning of the statute and the legislative intent supporting Section 2423(a). If the government were correct in its claim that the plain meaning of "sexual" does not apply to Section 2423(a), then the statute's sphere of prohibited conduct would be left to the creative judgment of prosecutors. Due process, however, has never allowed this:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government. [*United States v. Reese*, 92 U.S. 214, 221 (1875).]

Consider, for example, the case of James Klups, who was charged and pleaded guilty to violating 18 U.S.C § 2423(a) in the Western District of Michigan. *United States v. Klups*, 514 F.3d 532, 534 (6th Cir. 2008). In 1998, Mr. Klups embarked on a two-week trip with the victim, his eleven-year-old biological granddaughter, leaving Michigan to travel to New Mexico. *Id.* Mr. Klups refused to take the victim's sister on the trip and told the victim before departing that her sister could not do what she could do. *Id.* On the way back to Michigan, Mr. Klups and the victim stayed at a hotel in Wisconsin. *Id.* While staying at the hotel, Mr. Klups placed the victim on top of one of his legs and moved her in a manner that caused her genitalia to rub against his leg. *Id.* The victim reported that Mr. Klups moaned during the incident. *Id.* During the incident, Mr. Klups wore only his underwear and the victim wore a bathing suit. *Id.* In outlining the background of the case, the United States Court of Appeals for the Sixth Circuit stated that "[t]he sexual contact that occurred at the hotel is chargeable as a criminal offense in both Wisconsin and Michigan." *Id.* Mr. Klups was indicted in 2004 and pleaded guilty to violating Section 2423(a) in 2005. *Id.*

Remarkably, the position the government has taken in connection with its prosecution of Dr. Nagarwala and Dr. Attar would have foreclosed the government from prosecuting Mr. Klup pursuant to the statute under which he was convicted, given that the government would not have been able to establish Mr. Klup engaged in "sexual activity." As previously indicated, Section 2246(2)'s definition of "sexual act" – the definition in this case the government claims is synonymous with Section 2423(a)'s "sexual activity" requirement – does not proscribe over-the-clothes touching of the genitalia of a minor. In Mr. Klup's case, the eleven-year-old victim wore a bathing suit, so his conduct would not be "sexual activity" under the government's desired definition.

Undoubtedly, arbitrary enforcement of Section 2423(a) is not merely a *potential* problem; the government has already read Section 2423(a) in an inconsistent and manipulated manner and, as demonstrated, the government appears willing, even eager, to revise its interpretation of Section 2423(a) depending on its litigation strategy *of the moment*. In the instant case, the government has determined that for this case, because it seeks to punish non-sexual conduct, Section 2246(2)'s definition of "sexual act" should apply to Section 2423(a). Nevertheless, when presented with another case factually similar to that of Mr. Klup, it would not be at all surprising if the same Office of the United States Attorney charged the individual with violating Section 2423(a), premised upon the theory that the defendant engaged in "sexual activity" pursuant to the plain meaning of the phrase.

Where, as here, the risk of arbitrary enforcement is real, this Court should not condone the government's unconstitutional attempt to shape Section 2423(a) to fit a litigation strategy. The arbitrary and inconsistent position that the government seeks is not an example of how different courts interpret the same statutory provision differently. The arbitrariness at issue here arises from the fact that the government has taken inconsistent positions in an attempt to circumvent the penalties that Congress has enacted for convictions for FGM.

Proof that a defendant engaged in conduct for the purpose of libidinal gratification properly limits the otherwise "standardless sweep" of Section 2423(a). To dispose of the plain meaning of the statute would only invite the subjective and arbitrary enforcement that due process rejects.

CONCLUSION

Dr. Nagarwala and Dr. Attar respectfully request that this Court dismiss count 6 of the indictment charging conspiracy to transport a minor with intent to engage in criminal sexual activity in violation of 18 U.S.C. § 2423(a) and (e) because the conduct alleged by the government does not fall within the conduct proscribed by the statute. Alternatively, the statute is unconstitutionally vague both facially and as applied to Dr. Nagarwala and Dr. Attar.

Respectfully submitted,

Dated: 9/20/2017

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Dated: 9/20/2017

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification to parties enrolled through the ECF system. A hard copy has been mailed via the United States Postal Service to those who are not enrolled.

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